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No. 91-

In the Supreme Court

OF THE

United States

OCTOBER TERM 1990

IMPERIAL IRRIGATION DISTRICT,
Petitioner,
v.
STATE WATER RESOURCES CONTROL BOARD,
Respondent,
ENVIRONMENTAL DEFENSE FUND, INC.,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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Questions Presented for Review

1. Does the Boulder Canyon Project Act delegate to the Secretary of Interior primary or exclusive jurisdiction concerning what are reasonable uses and methods of use of Colorado River water by entities with Section 5 contracts?

2. Despite the Secretary's approval of uses and methods by Petitioner, does California's State Water Resources Control Board[1] have jurisdiction to order Petitioner, who executed a contract in 1932 for permanent service of water with the Secretary of Interior under Section 5 of the Boulder Canyon Project Act ("BCPA"),[2] to fund construction of extensive works to create conserved water for the sole benefit of coastal plain urban users with similar Section 5 contracts of lower priority?

3. Does such an order violate the "*supremacy* given the Secretary's contracts . . ."[3] by Congress "and thwart full realization of the benefits Congress intended this national project to bestow[?]"[4]

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[1]Herein "SWRCB" or "Board."

[2]Boulder Canyon Project Act of 1928, 45 Stat. 1057, 43 U.S.C. §§ 617 *et seq.* (1986 & Supp. 1991).

[3]*Arizona v. California*, 373 U.S. 546, 580 (1963) ("*Arizona I*") Emphasis added in all cases herein unless otherwise noted.

[4]*Id.* at 590.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
I	
Opinions Below	1
II	
Statement of Jurisdiction	2
III	
Federal Question	2
IV	
Statement of the Case	8
A. Federal Involvement	8
1. The Contracts	8
2. Federal Supervision	10
B. State Involvement	11
1. State's Concern Was For "People Generally"	11
2. State Ignored Federal Approval	12
3. Order WR 88-20 Reallocates The Federal Priority Rights	13

TABLE OF CONTENTS

Page

V

Reasons for Granting Writ 15

A. Congressional Policy, As Explicated By This Court And Implemented By The Secretary Of Interior, Would Be Substantially Eroded If *IID-II* Were Allowed To Stand 15

1. National Concern For Irrigation Projects .. 15

2. Implementation By 43 C.F.R. Part 417 19

3. Summary 21

B. When State Action Interferes With Congressional Policy And Directives — "State Law Has No Place" 23

1. *Arizona I* 23

2. *California v. United States* 25

3. *California v. FERC* (herein *"Rock Creek"*) 27

VI

Conclusion 28

TABLE OF AUTHORITIES

Cases

	Page
Arizona v. California, 283 U.S. 423 (1931)	24
Arizona v. California, 373 U.S. 546 (1963) ..... i, 3, 14, 16, 18, 19, 23, 24, 25, 28	
Arizona v. California, 376 U.S. 340 (1964)	17, 19
Arizona v. California, 439 U.S. 419 (1979)	16, 17
Arizona v. California, 460 U.S. 605 (1983)	15, 16
Bryant v. Yellen, 447 U.S. 352 (1980)	10, 16, 19, 21, 26
California v. FERC, 495 U.S. ____, 109 L.Ed.2d 474 (1990)	16, 27
California v. United States, 438 U.S. 645 (1978)	25
California Development Co. v. New Liverpool Salt Co., 172, 792 (9th Cir. 1909)	8
Environmental Defense Fund, Inc. v. East Bay Municipal Utility District, 439 U.S. 811 (1978)	8
Escondido Mut. Water Co. v. La Jolla Indians, 466 U.S. 765 (1984)	16
FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	16
First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946)	16
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-319 (1987)	29
Fresno v. California, 372 U.S. 627 (1963)	18
Imperial Irrigation District v. State Water Resources Control Board, 186 Cal. App. 3d 1160 (1986) (*IID-I*)	2
Imperial Irrigation District v. State Water Resources Control Board, 225 Cal. App. 3d 548 (1990) (*IID-II*)	*Passim*
Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 P. 113 (1916)	8

Table of Authorities

Cases

	Page
International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986)	7
Ivanhoe v. McCracken, 357 U.S. 275 (1958)	18
Ivanhoe Irrig. Dist. v. All Parties and Persons, 53 Cal.2d 692, 350 P. 2d 69, 3 Cal. Rptr. 317 (1960)	23, 24
Jones v. California Development Co., 173 Cal. 565, 160 P. 823 (1916)	8
Nollan v. California Coastal Comm., 483 U.S. 825, 841-842 (1987)	29
Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986)	7
United States v. Gerlach Live Stock Co., 339 U.S. 725, 752-753 (1950)	29

Statutes

California Water Code	
Sec. 1011	24
Sec. 20500, *et seq.*	8
Code of Federal Regulations, Title 43, Part 417	
Sec. 417	20
Sec. 417.2	20
Sec. 417.3	20, 21
Sec. 417.5	20
29 Fed. Reg. 13,605-13,606 (1964)	
34 Fed. Reg. 11,499-11,500 (1969)	20
37 Fed. Reg. 18,076-18,078 (1972)	20
Pub. L. No. 90-515, 82 Stat. 868 (September 26, 1968)	15
Publ L. No. 90-537, 82 Stat. 885	23
Pub. L. No. 93-320, 88 Stat. 266	23
Pub. L. No. 95-18, 91 Stat. 36	23

TABLE OF AUTHORITIES

STATUTES

	Page
Pub. L. No. 96-336, 94 Stat. 1063	23
Pub. L. No. 98-63, 97 Stat. 301, 315, 352	10, 23
United States Code, Title 28, Sec. 1257(3)	2
United States Code, Title 43	
Sec. 617 et seq.	i, 19
Sec. 1502, et seq.	23
Sec. 1571	23

Textbooks

Abbott, *California Colorado River Issues,* 19 Pac. L. J. 1391 (1988)	6
Bulletin 4, DWR/SWRCB, January 1982	5
Bulletin No. 198, DWR, *Water Conservation in California,* May, 1976	5
Dunning, *The Physical Solution in Western Water Law,* 57 U. Colo. L. Rev. 445 (1986)	6
Nathanson, *Updating The Hoover Dam Documents,* 97 (1978)	23
Water Policies For the Future, Final Report to the President and to the Congress of the United States by the National Water Commission, June, 1973	15
Wilbur & Ely, *The Hoover Dam Documents,* A589 (1948)	9, 14

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioner, Imperial Irrigation District ("IID"), respectfully requests that this Court issue a Writ to review the opinion of the California Court of Appeal, Fourth Appellate District, Division One, filed November 21, 1990.

I

OPINIONS BELOW

1. The subject opinion, *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal. App. 3d 548, 275 Cal. Rptr. 250 (1990) ("*IID-II*"), whereby the Court of Appeal affirmed the trial court's approval of orders made by the California administrative agency (herein the "Board" or "SWRCB") which ordered IID to use its financial resources to create conserved water from

Boulder Canyon Project water deliveries for the sole benefit of lower priority users or other Californians, is in the separate appendix filed herewith, at Appendix, 3. The trial court judgment is at Appendix, 42; the trial court statement of decision is at Appendix, 46; the Board's Order WR 88-20 is at Appendix, 53; *Imperial Irrigation District v. State Water Resources Control Board,* 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (1986) ("IID-I") is at Appendix, 101; the trial court judgment is at Appendix, 121; the Board's Order WR 84-12 is at Appendix, 127; and the Board's Decision 1600 is at Appendix, 151.

II

STATEMENT OF JURISDICTION

The opinion of the Court of Appeal, *IID-II,* was entered on November 21, 1990. A petition for rehearing was denied on December 12, 1990, and on March 15, 1991, the Supreme Court of California denied, without opinion, a Petition for Review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

III

FEDERAL QUESTION

The California Court of Appeal, by affirming "this specific instance of *far-reaching change* . . ." (*IID-II,* 225 Cal. App. 3d at 573, 275 Cal. Rptr. at 267, Appendix, 40) has caused a direct confrontation between the regulatory powers of the Secretary of Interior over the use of Colorado River water developed and released to users under the Boulder Canyon Project Act and the administrative powers of the SWRCB.

At the commencement of hearings before the SWRCB, IID, referencing *Arizona I*, stated that "[t]he doctrine of Federal pre-emption or supremacy could become important if the SWRCB should disagree with IID's present operational procedures . . . ." Memorandum of Points and Authorities on Behalf of Imperial Irrigation District, 6, Appendix, 234. Next, at the first level of judicial review, IID elaborated on Federal supremacy principles and contended that Decision 1600 directly conflicted with Congressional mandates. Memorandum of Points and Authorities of Imperial Irrigation District In Support of Complaint For Declaratory Relief, In the Alternative For Writ of Mandamus, 33-39, Appendix, 250-255.

At the second level of review (the Court of Appeal), IID's Opening Brief explained:

> The pattern of decisions made by members of IID's board and staff, as their best collective wisdom suggested, focused on the 'reclamation and cultivation of arid land . . . for agricultural purposes . . . .' [fn. 8] IID lobbied for construction of a massive federal project on the Colorado river [fn. 9], issued debt and suffered bankruptcy [fn. 10], constructed an electric system [fn. 11], established its water rights by U.S. Supreme Court decree [fn. 12], and, also, its freedom from the 160-acre limitation of the 1902 Reclamation Act. [fn. 13][1]

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[1]The footnote references noted in the quoted text are:

> "*8, Greeson v. Imperial Irrigation Dist.* (9th Cir. 1932) 59 F.2d 529, 532; *n. 9, Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318, 328. See Boulder Canyon Project Act (1928) 43 U.S.C.A. §§ 617, et seq.; *n. 10, Wells Fargo Bank v. Imperial Irrigation Dist.* (9th Cir. 1943) 136 F.2d 539; *In re Imperial Irrigation Dist.* (1935) 10 F.Supp. 832, 841; *n. 11, Imperial Irrigation Dist. v. Nevada-California Corp.* (9th Cir. 1940) 111

IID also repeatedly asserted the Federal basis for its rights.[2] The Court of Appeal, fully cognizant of the Federal rights aspects, recognized both that IID had "achieved water use efficiencies which are above average for comparable [Federal] projects" (*IID-II,* 225 Cal. App. 3d at 571, 275 Cal. Rptr. at 266, Appendix, 38), and "that IID's water rights, based as they are on a unique blend of statutory and contractual origins, could be characterized as somehow more stable or securely vested than water rights from traditional [i.e., purely California law] sources." *Id.* at 561, 275 Cal. Rptr. at 260, Appendix, 23.

IID emphasized to the Court of Appeal that the Bureau of Reclamation had approved IID's operational practices.[3] IID also vigorously contended that its practices were reasonable under state law.

F.2d 319; *n. 12, Arizona v. California* (1963) 373 U.S. 546; Id. (1964) 376 U.S. 340; Id. (1979) 439 U.S. 419; Id. (1983) 460 U.S. 605; *n. 13, Bryant, supra,* 447 U.S. 352; bureaucratic vacillation spanned four presidential administrations. Id. at 363, n. 14."

[2]SWRCB's Decision 1600 itself explained the federal basis for IID's rights to receive deliveries of Colorado River water from the United States via the Boulder Canyon Project. Decision 1600, 9-19; Appendix, 165-174.

[3]IID introduced four lengthy exhibits (see Detailed Index, Administrative Record (AR) Part II, Item 5, Exhibits 21, 22, 24, and 25, Appendix, 300) that showed its involvement with requirements of the Secretary of Interior. The Bureau of Reclamation introduced two Exhibits (AR, Part II, Item 12, Exhibits 1 and 2, Appendix, 304) that explained the federal approach for dealing with potential opportunities to create conserved water within the irrigation project in Imperial Valley, California.

Mr. McCullough, the Bureau's Regional Planning Officer, testified IID's "... records to be reliable" (AR, Part II, Item 1, Vol. VI, 98) and presented a table which estimated IID's losses of 33% and crop consumptive use of 66%. AR, Part II, Item 5, Ex. 23. He testified that

In addition to the legal or jurisdiction-to-decide aspects, the facts pertinent to the conflict which these overlapping regulatory powers caused were presented and discussed at each stage of the proceedings below.[4] After

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the Bureau, among other matters, annually reminded of "the continuous need for conservation." On September 20, 1974, the Bureau's Regional Director wrote IID after "due consideration . . . it is determined that your request for additional water is adequately justified." On February 21, 1978, the Regional Director wrote IID, "I am pleased with your 13-point program . . . . I urge you to continue to provide programs for your water users with emphasis on water conservation." By letter dated December 12, 1980, the Bureau's Director reminded, "[i]n accordance with *43 C.F.R. Part 417,* [our] representatives . . . have *met each year* at your office to discuss water conservation measures and operating practices . . . your 21-point program . . . is a *progressive* one which certainly contributes to the efficient and wise use of water."

Also, Mr. McCullough testified "how well the district conveys and utilizes the water supply." AR, Part II, Item 1, Vol. VI, 95. By letter of August 23, 1978, the Bureau's director advised that both the "canals and related structures are in excellent condition."

[4]For example, the Board introduced into evidence ten exhibits that detailed Federal involvement with IID's irrigation project (*See,* AR, Part II, Item 2, Exhibits 7 through 16, Appendix, 292-293), and the Department of Water Resources explained the essence of IID's rights and relationships with the Bureau. *See,* AR, Part II, Item 4, Exhibit 1, Appendix, 297.

Study of the potential for conservation opportunities in IID's irrigation project had been made by California as well as the Bureau. For example, Bulletin No. 198, DWR, *Water Conservation in California,* May 1976; Bulletin 4, DWR/SWRCB, January 1982.

However, all involved repeatedly found conserving more water from agricultural projects should not be paid by those agricultural users for the benefit of urban users with junior Federal rights. See, AR, Part I, Item 104, Appendix, 269, in December, 1982, DWR Director says it is "not economic" for IID to salvage this water. The Metropolitan Water District of Southern California ("MWD") said,

Decision 1600 was filed, the Regional Director Lower, Colorado Regional Office, Bureau of Reclamation, acting for the Secretary, requested the Board to reconsider its finding "of misuse of water at this time" contending that "implementing additional conservation measures . . . [has] been *economically infeasible* because no use existed for the conserved water." Letter, July 18, 1984, Appendix, 338-339.

Nevertheless, the Court of Appeal brushed aside these facts and instead interpreted California law as having specifically given the Board exclusive "supervision over water waste permitted by anyone in the state, including IID . . . ." *IID-II*, 225 Cal. App. 3d at 567, 275 Cal. Rptr. at 264, Appendix, 31. The *IID-II* opinion conceded that its effect was "governmental redefinition of water rights" and affirmance of "this specific instance of far-reaching change." *Id.* at 573, 275 Cal. Rptr. at 267, Appendix, 40.

Under these circumstances the question-raised-and-decided-below prerequisite has been clearly met. Even if the Supremacy Clause (pre-emption issue) had not been

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"[F]unds obviously not available to Imperial." Burec said "[E]conomically infeasible for IID." The Colorado River Board said program "not currently economically justified for Imperial." *Id.* Item 25; AR, Part II, Item 7, Ex. 1, 16. EDF's study (AR, Part II, Item 8, Ex. 3) envisioned no cost to IID, no decrease in agricultural productivity and recoupment of benefits "following 20 (or 10) years." *Id.* at 92; *see also v.*

In fact, "the idea" of an "arrangement" whereby junior urban users would fund the cost of facilities to create conserved water from irrigation projects "goes back at least to the 1950's." Dunning, *The Physical Solution in Western Water Law*, 57 U. Colo. L. Rev. 445, 480, n.190 (1986). The former General Counsel for MWD explained that the "stumbling block [for such an arrangement] has been the amount of money . . . [MWD would pay]." Abbott, *California Colorado River Issues*, 19 Pac. L. J. 1391, 1415-1416 (1988).

presented, factually developed, or decided at all by California, the question, whether a state (or its agencies) has jurisdiction to regulate a Federal project can be raised before this Court for the first time.[5] In *International Longshoremen's Assn. v. Davis,* 476 U.S. 380 (1986), this Court considered a pre-emption issue raised only in post-trial proceedings, holding, "the point is . . . whether jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *Id.* at 387-388 (emphasis in original).

Under the same rationale, in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering,* 476 U.S. 877 (1986), this Court, on certiorari to a state supreme court, considered a supremacy pre-emption issue, neither explicitly raised below nor decided by the state court. It too involved a "jurisdictional controversy." *Id.* at 878. As there, this Court's consideration of the Federal pre-emption issue "[would not] disservice . . . [California Courts] or . . . litigants, or impair [ ] . . . [an] informed decision of the issue." *Id.* at 883.

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[5]At the third level of review, Petition for Review to the California Supreme Court, by a letter supporting review (February 19, 1991), the Central Valley Project Water Association stated:

> Such a nebulous and undefined standard to evaluate whether the way local agencies are operating their publicly-owned water system *might well collide with federal supremacy issues.* California may only impose conditions which are 'not inconsistent with congressional authorization.' *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 192. *See, California v. United States* (1978) 438 U.S. 645, 674-675; *Arizona v. California* (1963) 373 U.S. 546, 588. The CVP is a federal project with many repayment obligations which could be jeopardized by the endless scope of *IID-II*'s perception of the SWRCB's so-called expertise.

In view of the record presenting such a direct conflict of power to decide between the Federal and state regulatory agencies, the merits of the supremacy and preemption issues present a jurisdictional controversy that is ripe for decision.[6]

IV

STATEMENT OF THE CASE

A. Federal Involvement

1. The Contracts

Petitioner was formed in 1911 under the California Irrigation District law.[7] Its purpose was and continues to be to provide a publicly-owned structure so that desert land could be protected against floods and "with the aid of irrigation . . . become enormously productive."[8]

IID first contracted with the United States on October 23, 1918 obtaining the right to use Laguna Dam and the obligation to pay the United States $1.6 million. Wilbur & Ely, *The Hoover Dam Documents,* A589 (1948). This

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[6]If this Court concludes that before the merits are reached, the California Court of Appeal should directly address the supremacy issue, a remand for that purpose may be appropriate. *Cf., Environmental Defense Fund, Inc. v. East Bay Municipal Utility District,* 439 U.S. 811 (1978).

[7]*Imperial Land Co. v. Imperial Irrigation District* 173 Cal. 660, 668, 161 P. 113, 116 (1916). The Irrigation District Law, California Water Code § 20500, *et seq.* (West 1984 & Supp. 1991).

[8]The Salton Sea cases, *California Development Co. v. New Liverpool Salt Co.,* 172 F. 792, 794 (9th Cir. 1909). "Irrigated farms were laid out and sold, towns sprung up, a railroad was constructed, and in verity this desert was made to blossom like the rose." *Jones v. California Development Co.,* 173 Cal. 565, 568, 160 P. 823, 824 (1916).

contract was incorporated within the All-American Canal contract of December 1, 1932, made "particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act . . . ." *Id.* at A595, Appendix, 354.

In the All-American Canal contract the United States promised that:

> As far as reasonable diligence will permit *said water* shall be delivered *as ordered by the District, and as reasonably required* for potable and irrigation purposes within the boundaries of the District in the Imperial and Coachella Valleys in California. This contract is for permanent water service . . . .

Id. at A607-608, Appendix, 374-375.

The words "said water" referenced IID's "third priority . . . for beneficial consumptive use, [of] 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above." *Id.* at A606, Appendix, 371-372. The first two priorities were for Palo Verde Irrigation District and the Yuma Project. After IID's priority, the fourth and fifth priorities were for the Coastal Plain urban users.

IID's Section 5 contract specifically required it to make repairs according to the Secretary's instructions (Art. 9; Appendix, 360); to make payments for the canal's cost (Art. 10; Appendix, 361); to measure the water according to the Secretary's instructions (Art. 18; Appendix, 376); to make written reports as directed by the Secretary (Art. 19; Appendix, 376); to conform to rules and regulations prescribed by the Secretary (Art. 24; Appendix, 380); and to submit to inspections by the Secretary (Art. 25; Appendix, 380). Title was to remain in the United States subject

to repayment and the Secretary's discretion (Art. 22; Appendix, 379).

In *Bryant v. Yellen*, 447 U.S. 352, 361, n.10 (1980), this Court explained:

> The All-American Canal system was not declared completed until 1952. By that time, pursuant to the 1932 contract, the care, operation, and maintenance of the system, with specified exceptions, had been transferred to the District, although title to the Imperial Dam and the canal remained in the United States.

2. Federal Supervision

In 1964, the Secretary issued regulations providing procedures "to the end that deliveries of Colorado River water to each contractor will not exceed those *reasonably* required for beneficial use under the respective contract[s]."[9]

IID and Burec officials had frequent interchanges, and IID complied each year with the requirements of the United States for conservation and reasonable use procedures of its Colorado River water. Burec's written testimony (Appendix, 309) pointed out that it and IID had made an agreement "in September 1981" (*id.* at 320) to study "Water Conservation Opportunities in Imperial Irrigation District, California." Also, in 1983, Congress authorized the Secretary "to engage in feasibility studies of . . . (3) Water conservation and efficient use program, All-American Canal relocation project, located in Imperial County, California (Supplemental Appropriations

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[9]Fed. Reg. 13,605-13,606 (1964) (codified at 43 C.F.R. Part 417), (adding a new part to Title 43 of the Code of Federal Regulation). *See infra* notes 19-21.

Act, 1983, Pub. L. No. 98-63, 97 Stat. 301, 315 (July 29, 1983)) approving $397,000 to Bureau of Reclamation for 'General Investigations'." 97 Stat. at 352. The studies initiated by the 1980 Burec/IID Agreement[10] resulted in a published "Special Report, July 1984, Water Conservation Opportunities in Imperial Irrigation District, California."[11]

Obviously, these actions by Burec officials were taken pursuant to regulations made by the Secretary under authority as established by Congress in the Boulder Canyon Project Act.

B. State Involvement

1. State's Concern Was For "People Generally"

California has reached exactly the opposite conclusion concerning the very same operational practices and long standing supply/demand regime of IID's Colorado River water. The Court of Appeal characterized the dispute between IID and the Board as whether water lost to consumptive use in IID's irrigation project "was or was not reasonable." *IID-II*, 225 Cal. App. 3d at 553, 275 Cal. Rptr. at 255, Appendix, 11. The Court accepted the trial court's characterization that "[t]he Board did *not* find that IID's uses of water, *in themselves,* were unreasonable." *Id.* at 570, 275 Cal. Rptr. at 265, Appendix, 35. It also accepted the overwhelming evidence that IID "achieved water use efficiencies which are above average for comparable projects." *Id.* at 571, 175 Cal. Rptr. at 266, Appendix, 38.

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[10]See also *supra*, notes 3-5.

[11]It contemplated, "Future public involvement [which] will include discussions on MWD participation and cost-sharing in both planning and construction activities." *Id.* at 20.

Nevertheless, it upheld the Board's orders because a use which may be " 'beneficial' in some respect . . . does not make such use 'reasonable' when compared with demands, or even future demands, for *more important uses.*" *Id.* at 571, 275 Cal. Rptr. at 266, Appendix, 36-37. These "more important uses" were described by the Court of Appeal "for the benefit of people, generally, in the state—*i.e.*, for the benefit of undetermined and unnamed future potential users." *Id.* at 569, 275 Cal. Rptr. at 264, Appendix, 33-34.

It held that "the Board was to serve as supervisor and regulator of the activities of actual [Colorado River] water deliverers [*id.* at 567, Appendix, 31] . . . [and] that the Board is *the* expert . . . [with] no call to defer to the decisions of IID in the field of water waste." *Id.* at 568, 275 Cal. Rptr. at 264 (emphasis in original), Appendix, 33.

2. State Ignored Federal Approval

The Court recognized that water "used by IID and its customers . . . [was] authorized by the Boulder Canyon Project Act . . . [and] contracts for the delivery and allocation . . . to users in the southwestern United States . . . [and] finally resolved by the United States Supreme Court in 1963." *Id.* at 561, 275 Cal. Rptr. at 259, Appendix 22. The substantial interference that the SWRCB's orders caused IID and its irrigation project were also noted. The Court wrote:

> There can be no doubt that the Board's intrusion into IID's previously untrammeled administration of the use of water in its district *was substantial.* . . . While the Board's decision in no way interfered with IID's water, it *most certainly presaged* an interference with *IID's utilization* of that water once it traversed the All-American Canal.

Id. at 562, 275 Cal. Rptr. at 260, Appendix, 24.

The Court also stated that the Board *did* "substantially erode IID's otherwise virtually complete control over its water use [*id.* at 562, 275 Cal. Rptr. at 260, Appendix, 24] . . . [and] IID . . . has been deprived of a great deal of the property rights which it thought were inherent in its allocation of Colorado River waters, made many years ago by federal and state statute and private contract . . . [and] eroded IID's bargaining position . . . [with] the Metropolitan Water District." *Id.* at 571, 275, Cal. Rptr. at 266, Appendix, 37.

Finally, even though the Court characterized IID as having a "vested right in a geographical part of the country that is 'far western,' embracing a philosophy that is independent in every sense of the word" (*id.* (emphasis in original), Appendix, 37), it held "California is engaged in an evolving process of *governmental redefinition* of water rights . . . [and we affirm] this specific instance of *far-reaching change* . . . ." *Id.* at 573, 275 Cal. Rptr. at 267, Appendix, 40.

3. Order WR 88-20 Reallocates The Federal Priority Rights

The Board's Order WR 88-20 on September 7, 1988 is the latest action which finally, severely and substantially impacted IID's prior federal water rights and public fisc. The Board found "that conservation of 367,900 acre-feet per annum . . . is a reasonable long-term goal which will assist in meeting future water demands. The Board will retain jurisdiction to review implementation of the *initial plan and future* water conservation measures." *Id.* at 44, Appendix, 97.

The Board's initial plan ordered implementation by IID of "water conservation measures . . . sufficient to con-

serve at least 100,000 acre-feet per annum by January 1, 1994." *Id.* at 44, Appendix, 98. However, to the consternation of IID, the Board ordered IID "to secure *funding* . . . of the selected water conservation measures *using District resources*. . . ." *Id.* at 45, Appendix, 98. No cost estimates were made by the Board, but the Bureau's estimates (Appendix, 316) suggest a $100,000,000 range just for the initial plan.

This order amounts to an award of damages against the farmers of IID in favor of the urbanites on California's south coastal plain who depend upon MWD for water. MWD's own Section 5 contract with the Secretary (Wilbur and Ely, *supra,* A507) gave it the last 550,000 acre feet (fourth priority) of the 4.4 million acre feet of water allocated by Congress to California. *Arizona I,* 373 U.S. at 565. Thus, unless IID increased its agricultural uses by 100,000 acre feet, the 100,000 acre feet of conserved water would pass, automatically, to MWD under its lower fourth priority. This windfall to MWD must, according to Order WR 88-20, be totally funded by IID. *Ergo,* in effect, a damage award in the $100 million and more range.

California, if not restrained, would turn the Secretary's allocation of Colorado River water among California's water users upside down. Moreover, IID's present perfected rights, rooted in the 1922 Colorado River Compact, preserved by the Boulder Canyon Project Act and decreed by this Court in 1979, are ignored. In effect, the Board says it is necessary for IID's farmers to pay for creating conserved water for lower priority users, while the Secretary says such costs should be borne by those who would benefit from the new water.

The Secretary's position is consistent with recommendations by the National Water Commission.[12] The Commission's Final Report noted that opportunities existed for some transfers of water from relatively low value agricultural use to higher value municipal and industrial uses. *Id.* at 125, 229, 260. It envisaged legal protection for existing users (*id.* at 266, n.76; Recommendation 7035, 269), eschewed "uncompensated transfers" (*id.* at 326), and urged economic protection for present users and areas of origin. *Id.* at 330; Recommendation 8-3(b), 333.

V

REASONS FOR GRANTING WRIT

A. Congressional Policy, As Explicated By This Court And Implemented By The Secretary Of Interior, Would Be Substantially Eroded If *IID-II* Were Allowed To Stand

1. National Concern For Irrigation Projects

A brief review of precedent provides the legal framework for yet "another chapter in this original action brought to determine rights to the waters of the Colorado River." *Arizona v. California,* 460 U.S. 605, 608 (1983).

The Court there reminded that "the Boulder Canyon Project Act of 1928 . . . [was] a vast *federal* effort to

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[12] *Water Policies For The Future,* Final Report to the President and to the Congress of the United States by the National Water Commissiont, June, 1973. The Commission was created by the National Water Commission Act, Pub. L. No. 90-515, 82 Stat. 868 (September 26, 1968).

harness and put to use the waters of the lower Colorado River." *Id.* Also:

> "The long and rich story . . . need not be repeated here. We agreed with the Special Master that the allocation of Colorado River water was to be governed by the standards set forth in the Project Act rather than by the principles of equitable apportionment . . . [or] the local law of prior appropriation . . . ."

Id. at 609.[13]

This 1983 case explained that the law of the use and disposition of the waters of the Colorado River "has been and continues to be governed mainly by statutory considerations." *Id.* at 616. The Court emphasized the important role of "Certainty of rights . . . with respect to water rights in the Western United States." *Id.* at 620.

In a supplemental decree, following *Arizona I's* 1964 decree (376 U.S. 340), this Court established the present perfected rights of IID "not to exceed (i) 2,600,000 acre-feet . . . or (ii) the quantity . . . required for irrigation of 424,145 acres . . . whichever of (i) or (ii) is less, with a priority date of 1901." *Arizona v. California*, 439 U.S. 419, 429 (1979).

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[13]Justice White, who wrote for the majority, also authored *Bryant v. Yellen*, 447 U.S. 352 (1980), and has participated as a member of this Court in each chapter of this saga, since *Arizona I*. This seminal case provides the guidepost and answer for analyzing the case at bar. Compare this Court's use of *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), in *California v. FERC*, 495 U.S. ____, 109 L.Ed.2d 474, 485 (1990), and the case of *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), in *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 786 (1984). The former was a four decade precedent, the latter only two. At bar, this binding precedent covers nearly three decades.

These rights were to "be exercised only for *beneficial* uses." *Id.* at 421. The "reasonable" requirement, pursuant to Federal policy and implemented by 43 C.F.R. Part 417, was also contained in the Secretary's 1932 contract with IID.

In the 1964 decree, this Court made clear that:

> *Water Controlled by the United States* refers to the water in Lake Mead, Lake Mohave, Lake Havasu and all other water in the mainstream below Lee Ferry and within the United States.

Arizona v. California, 376 U.S. 340 (1964).

Moreover, the State of California was specifically enjoined from doing what Order WR 88-20 would, if not set aside, accomplish in fact. The decree enjoined California:

> (A) From interfering with the management and operation . . . of regulatory structures controlled by the United States;
>
> (B) From interfering . . . with releases and deliveries, . . . of *water controlled by the United States*;
>
> (C) From . . . purporting to authorize the diversion of water . . . which *has not been authorized by the United States for its particular use*;
>
> (D) From . . . purporting *to authorize the consumptive use of water* from the mainstream in excess of the quantities permitted under Article II of this decree."

Id. at 346-347.[14]

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[14]Article II of the decree (*id.* at 341-346) set forth, in injunctive form, the manner by which officers of the United States were to operate the Boulder Canyon Project in conformity with the directives of Congress as interpreted in *Arizona v. California*, 376 U.S. at 341.

In *Arizona I*, the Court made manifestly clear that Congress did not intend for the states to "frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this *national project* to bestow." *Arizona I*, 373 U.S. at 590. Also:

> With the health and growth of the Lower Basin at stake, Congress [passed] . . . the Project Act . . . harness[ed] . . . the bountiful waters of the Colorado to sustain growing cities, to support expanding industries, and to transform dry and barren deserts into lands that are livable and productive.

Id. 588-589.[15]

A principal purpose of the Boulder Canyon Project Act was to again foster irrigation, which had existed 2,000 years ago, by the United States undertaking "to build as a *national project* the necessary works to control floods and store river waters *for irrigation* . . . ." *Id.* at 555.[16]

Congress directed the Secretary "to allocate the water among users within each State." *Id.* at 579. This

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[15]The promotion of agricultural irrigation was also an important aspect of the Central Valley Project developed under the Reclamation Act of 1902. In *Ivanhoe v. McCracken*, 357 U.S. 275 (1958), this Court explained: "In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, *the promotion of agriculture*." *Id.* at 294.

Likewise, as there, here "it seems farfetched to foresee the Federal Government 'turning its back upon a people . . . and allowing their lands to revert to desert." *Id.* at 299.

[16]This congressional concern for promotion of irrigation projects caused this Court to decide that the City of "Fresno has no preferential rights to contract for project water, but may receive it only if, in the Secretary's judgment, *irrigation* will not be adversely affected. *Fresno v. California*, 372 U.S. 627, 631 (1963).

"supremacy given the Secretary's contracts . . . [included power] to decide which users within each State would get water." *Id.* at 580. Congress also specifically directed that the Secretary was to make "no charge . . . for water or for the use, storage, or delivery of water for irrigation or for potable purposes in the Imperial or Coachella Valleys." BCPA, 43 USC § 617. Yet, remarkably, if the SWRCB orders are allowed to stand, the state will, contrary to Congressional directive, levy huge charges against IID for use of Colorado River water.

Federal policy provides that a primary focus of this national project was to foster reclamation and irrigation of public[17] and private desert lands for agricultural purposes and pursuits. State policy, according to *IID-II,* primarily focuses on so-called "more important uses." *IID-II,* 225 Cal. App. 3d at 571, 275 Cal. Rptr. at 266, Appendix, 37.

Article II of the Court's 1964 decree made clear that water was to be released *for use in California, "only* pursuant to valid contracts therefor made with such users by the Secretary of Interior, pursuant to Section 5 of the Boulder Canyon Project Act. . . ." *Arizona v. California,* 376 U.S. at 343. There was to be *no* water for "people, generally, in the state" as approved by the subject opinion — *IID-II,* 225 Cal. App. 3d at 569, 275 Cal. Rptr. at 264, Appendix, 33-34.

2. Implementation By 43 C.F.R. Part 417

In 1964, the Secretary formally implemented his powers to supervise the reasonable use and conservation of water under the Boulder Canyon Project Act and the

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[17] "In 1942 . . . the District expanded its boundaries to include 271,588 acres of the unpatented public lands." *Bryant, supra,* 447 U.S. 360, n. 9. See, IID's Contract, Art. 23. Appendix, 379.

Section 5 contracts by adopting Part 417 of Title 43 of the Code of Federal Regulations. *See supra* notes 9-10. On July 3, 1969, these rules were revised in their entirety "to establish new procedures for the adoption of recommendations relating to *water conservation practices* in the diversion, delivery, distribution, *and use* of Colorado River water . . . to the end that deliveries of Colorado River water to *each* contractor will not exceed that *reasonably* required for *beneficial* use." 34 Fed. Reg. 11,499-11,500 (1969) (codified at 43 C.F.R. § 417).[18]

Except for changes pertaining to Indian reservations (43 C.F.R. § 417.5), Part 417 is substantially the same in its current form as adopted in 1964. 43 C.F.R. § 417 (1990). IID has conformed to Federal requirements thereunder. It requires the Regional Director to consult with contractors (43 C.F.R. § 417.2, Appendix, 344), make recommendations and determinations (43 C.F.R. § 417.3, Appendix, 345) and gives contractors a right to appeal to the Secretary of the Interior. *Id.*

It requires the recommendations and determinations of the Regional Director to be based on many water management factors such as:

> the area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the condition of water carriage and distribution facilities, record of water orders, and rejections of ordered water, general operating practices, the operating efficiencies and methods of irrigation of

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[18]In 1972, Part 417 was revised "to specifically include Indian reservations and Federal establishments in the group of water users required to follow conservation practices. . . ." 37 Fed. Reg. 18,076-18,078 (1972) (codified at 43 C.F.R. § 417).

> the water users, amount and rate of return flows to the river, municipal water requirements and the pertinent provisions of the Contractor's Boulder Canyon Project Act water delivery contract.

43 C.F.R. § 417.3, Appendix, 345.[19]

Thus, Federal policy and directive vests in the Secretary (1) the contract-making power, (2) the power to make allocations among users in each state, (3) and the power to supervise and control the *distribution and use* of Colorado River water developed and stored by the Boulder Canyon Project. The promotion of successful irrigation projects according to perceived financial capacity of the agricultural economy was clearly intended.[20]

3. Summary

It is clear that under Federal policy the Secretary of Interior has been designated as the decision-maker for determination of what are reasonable practices for use including conservation of Colorado River water. He has implemented this function by adopting 43 C.F.R. Part 417. This regulation has been applied to IID's practices annually since 1965. He considered IID's practices to be reasonable and that requiring additional con-

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[19]This specificity of Federal standards for establishing reasonableness stands in stark contrast to the lack of *any* adopted rules by the Board and of *any* enactments by the California Legislature establishing standards for irrigation practices.

[20]Although IID was, and still is, obligated to repay the full costs of construction for the All-American Canal, the obligation was without an interest cost. *Bryant*, 447 U.S. at 361, n.10. The ability to sustain a viable agricultural economy would be seriously burdened by California's *ad hoc* effort at "far-reaching change." *IID-II*, 225 Cal. App. 3d at 573, 275 Cal. Rptr. at 267, Appendix, 40.

servation measures at this time was "economically infeasible." Appendix, 339.

On the other hand, in view of the far-reaching change in California water law forged by the Court in *IID-II,* the SWRCB is now the State's *expert* given "supervision over water waste permitted by anyone in the state, including IID. . . ." *IID-II,* 225 Cal. App. 3d at 567, 275 Cal. Rptr. at 264, Appendix, 31. This administrative agency has determined that IID's practices are unreasonable.[21]

The Court of Appeal said that Decision 1600 "[i]n no way interfered with IID's contractual and statutory entitlement to Colorado River water, [but] it *most* certainly presaged an interference with IID's *utilization* of that water once it traversed the All-American Canal." *Id.* at 562, 275 Cal. Rptr. at 260, Appendix, 24.[22]

Instead of such intrusive and far-reaching orders, which result in wholesale reallocations, Congress has

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[21]The basic rationale — to require IID to financially aid Californians generally — is clearly stated. See, Decision 1600, 19, 23, 29, 52, 56, 66, Appendix, 174, 179, 184-185, 206, 210, 219-220; WR 84-12, 16, Appendix, 141; WR 88-20, 44, Appendix, 98. In fact, IID received good grades from the Board, except for not funding conservation measures for future strangers. See, WR 88-20, 4-16; Appendix, 59-71.

[22]At that point the Court discussed Decision 1600's benign requirement to prepare "a comprehensive water conservation plan." Decision 1600, 67, Appendix, 220. As the trial court observed, "Decision 1600 simply requires the District to prepare plans. . . ." *IID-II,* 225 Cal. App. 3d at 562, 275 Cal. Rptr. at 260, Appendix, 23-24; Statement of Decision, Appendix, 49. However, the presagement of Decision 1600 certainly became reality in WR 88-20 when the Board ordered IID to fund the conservation of 100,000 acre feet and retained jurisdiction to consider requiring IID to fund the cost of far greater conservation measures.

proceeded with orderly development of the Colorado seeking to preserve and enhance prior rights.[23]

B. When State Action Interferes With Congressional Policy And Directives — "State Law Has No Place"

1. *Arizona I*

In *Arizona I,* this Court succinctly stated the preemption principle applicable to the *utilization* of Colorado River water by California users with Section 5 contracts.[24] It stated:

> "[I]t is the Act and the Secretary's contracts, not the law of prior appropriation, that controls the

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[23]For example, Congress consented to the Upper Colorado River Basin compact, executed on October 11, 1948, "in a bill approved by the President on April 6, 1949, 63 Stat. 31 . . . ." (Nathanson, *Updating The Hoover Dam Documents,* 97 (1978)); the "Colorado River Storage Project Act became law on April 11, 1956, 70 Stat. 105" (*id.* at 99); Congress was advised about the Secretary's actions and general principles and operating criteria "were first published in the Federal Register, 27 F.R. 6851, July 19, 1962" (*id.* at 107); the Colorado River Basin Project Act, authorizing the Central Arizona Project, became law on September 30, 1968, Pub. L. No. 90-537, 82 Stat. 885; 43 U.S.C. §§ 1502, et seq. (*id.* 195-216); Congress continued its concern with the Mexican Salinity Problem (*id.* 217-222); the Colorado River Basin Salinity Control Act became law June 24, 1974, Pub. L. No. 93-320, 88 Stat. 266, 43 U.S.C. 1571 (*id.* 223-230); on April 7, 1977 Congress enacted legislation to deal with drought conditions of 1976-1977, Pub. L. No. 95-18, 91 Stat. 36; appropriations were made to study opportunities for water conservation in Imperial Irrigation District in 1980, Pub. L. No. 96-336, 94 Stat. 1063, and in 1983 additional appropriations were made to study an All-American Canal relocation project, Pub. L. No. 98-63, 97 Stat. 301, 315, 352.

[24]In essence, as the California Supreme Court explained in *Ivanhoe Irrig. Dist. v. All Parties & Persons,* 53 Cal.2d 692, 704, 350 P. 2d 69,

> apportionment of water among the States. Moreover . . . the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law."

Arizona I, 373 U.S. at 586.

> "Where the Government, as here, has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws."

Id. at 587.[25]

> "Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights. . . . What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters *to users, state law has no place.*"

Id. at 588 (footnote omitted).[26]

75, 3 Cal. Rptr. 317, 323 (1960), "[t]he federal government with federal funds has lawfully developed water — project water . . . [which] [i]n a very real sense . . . is . . . the property of the United States."

[25]In *Arizona v. California,* 283 U.S. 423 (1931), Arizona sought to restrain Secretary Wilbur from proceeding with construction of Boulder dam because he had not complied with state law. The Court dismissed the petition stating, "[t]he United States may perform its functions without conforming to the police regulations of a state." *Id.* at 451.

[26]An entirely different issue would be presented if IID, pursuant to Cal. Water Code § 1011 (West 1985 & Supp. 1991), (Appendix, 351),

2. *California v. United States*

California v. United States, 438 U.S. 645 (1978), does not detract from previous Supreme Court pronouncements about congressional actions and intentions pertinent to the Boulder Canyon Project. In *Arizona I,* the Court explained how Congress was dealing with an international stream system which traverses 1,300 miles before emptying in the Gulf of California in the Republic of Mexico. *Arizona I,* 373 U.S. at 552.

By contrast, *California* involved the "Central Valley Project" (*California v. United States,* 438 U.S. at 647), and waters "of the Stanislaus River that will be impounded behind the New Melones Dam [which] arise and flow solely in California." *Id.* at 651. The United States filed to appropriate unappropriated water and objected to the Board's "attached 25 conditions . . . ." *Id.* at 652.

The Court noted that the Reclamation Act of 1902 was reflective of " 'cooperative federalism,' " (*id.* at 650) and stated that the history of reclamation contained a "consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653. However, in contrast to the Boulder Canyon Project Act, the Reclamation Act of 1902 contemplated that "once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law." *Id.* at 667.

The Court reiterated that "Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States . . . [and] that state water law does not control in the distribution of reclamation

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were to create conserved water and, with consent of the Secretary, agree on terms to transfer the conserved water to users on California's south coastal plain.

water *if* inconsistent with other congressional directives to the Secretary." *Id.*, at 668, n.21 (emphasis in original). It distinguished the New Melones dam project from the Boulder Canyon Project "because of the unique size and multistate scope of the [Boulder Canyon] Project, Congress *did not intend the States to interfere* with the Secretary's power to determine with whom and on what terms water contracts would be made." *Id.* at 674. It held that California could impose "conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing *the project in question*." *Id.*

In sum, as this Court stated in *Bryant*, when writing about present perfected rights:

> "While the source of present perfected rights is to be found in state law, the question of whether rights provided by state law amount to present perfected rights within the meaning of § 6 is *obviously one of federal law*."

Bryant, 447 U.S. at 371, n.22.

A fortiori, the reasonableness of irrigation practices and operational procedures under the Boulder Canyon Project is also obviously *one of federal law* to be decided by the Secretary and as provided in 43 C.F.R. Part 417.

At bar, there is no *jurisdiction* for the state to adjudicate or regulate in a manner which the United States considers to be *economically infeasible*. Doubtless the intrusive orders will impact IID's ability to complete repayment, or perform other obligations to the United States, and materially disturb the integrity and viability of Imperial County's agricultural economy. However, it is enough that judgment by the Secretary about what constitutes reasonable operating practices for this irrigation project would be superseded and overridden by California

if *IID-II* were allowed to stand. The Secretary, by Congressional mandate, by annual reviews, detailed studies, and three decades of experience, is the decision maker to supervise conservation of Boulder Canyon Project water and to reach balanced judgments "[i]n a large complex situation such as IID . . . ." Decision 1600, 26; Appendix, 182.

3. *California v. FERC* (herein *"Rock Creek"*)

This recent unanimous opinion concerned "overlapping federal and state regulation of a hydroelectric project located near a California stream." *California v. FERC,* 495 U.S. ____, 109 L.Ed.2d 474, 483 (1990). It provides persuasive logic in support of this petition.

FERC had required a "minimum flow rate for the project at 20 cfs. during the entire year . . . [but] the WRCB issued an order directing the licensee to comply with higher minimum flow requirements . . . ." *Id.* at ____, 109 L.Ed.2d at 484.[27]

The pre-emption issue turned on "the meaning of § 27 of the FPA . . . ." *Id.* at ____, 109 L.Ed.2d at 485. In analyzing that section, the Court explained:

> [T]he meaning of § 27 and the pre-emptive effect of the FPA are not matters of first impression. Forty-four years ago, this Court in First Iowa construed the section and provided the understanding of the FPA that has since guided the allocation of state and federal regulatory authority over hydroelectric projects.

Id. at ____, 109 L.Ed.2d at 485.

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[27]The Board's draft order required "permanent minimum flow rates of 60 cfs. from March through June and 30 cfs. during the remainder of the year." *Id.*

Similarly, for the dispute at bar, this Court should again "decline at this late date to revisit and disturb the understanding of . . . [BCPA] set forth in . . . [*Arizona I*]" and adhere to its precedential holdings because there "has been no sufficient intervening change in . . . [federal] law, or indication that . . . [*Arizona I*] has proved unworkable: . . ." *Id.*

The "broad and paramount federal regulatory role" (*id.* at 487), established by the FPA for the Federal Power Commission was similar, in nature, to that established by the Boulder Canyon Project Act for the Secretary. The Boulder Canyon Project Act has, also, " 'seen careful, intense, and sustained congressional attention'." *Id.* at 487. *See supra* note 23.

To permit the subject opinion to stand would condone " 'a dual system of futile duplication'." *Id.* at 488. There is "no room or need for conflicting state controls" of IID's irrigation project. *Id.* In the BCPA " 'there is no suggestion that the two agencies both shall have final authority.' " *Id.* Finally, "[a]llowing California to impose significantly higher . . . requirements would disturb and conflict with the balance . . . [determined by the Secretary]." *Id.* at 491.

VI

CONCLUSION

Any fair comparison of benefit/cost relationships would make ludicrous the results of WR 88-20 which ordered IID to fund all economic costs.[28] IID's farmers would

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[28]For example, as between MWD and IID, comparative population (14.5 million v. 100,000), assessed valuation ($597 billion v. $2.5 billion), and annual revenues ($495 million v. $24 million) suggest that MWD's water hardship should not be converted into an economic disaster for IID. Clearly, MWD can more easily afford the cost of

gain nothing in the form of increased crop yields or higher crop prices by funding the conservation facilities. However, if the coastal users provided the funding, they would receive additional supplies at costs much less than other potential new supplies. The Secretary was sensitive to these very basic but important economic considerations, but the Board was not. It knew that farmers were "experiencing economic hardship" (WR 88-20, 19, Appendix, 73), but cavalierly directed that "the possibility of funding certain conservation measures with revenue from electrical power sales should be investigated." *Id.* at 20, Appendix, 74. Principles of basic fairness, utilized in a balanced judgment by the Secretary and deeply embedded in law, have been overlooked by the Board. *See, e.g., Nollan v. California Coastal Comm.*, 483 U.S. 825, 841-842 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-319 (1987); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-753 (1950). "No reason appears why those who get the waters should be spared from making whole those from whom they are taken."

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creating conserved water for its benefit, than those who brave the desert clime to produce food and fiber for the Nation's well-being.

Because California, contrary to the BCPA and binding precedent, has intruded upon the Secretary's powers and obligations to supervise and control the distribution, conservation, and use of Colorado River water, this Court should issue a writ of certiorari to review the subject opinion.

Respectfully submitted,

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